APPENDIX I.

In the Court of Appeals of Franklin County, Ohio.

Ralph Rea, Plaintiff-Appellee, vs. Margaret Fornan, et al., Defendants-Appellants.	Nos. 3295, 3300, 3301, 3302.

Decision on Merits.

(Rendered on the Twelfth Day of March, 1942.)
(46 N. E. (2d), 649.)

Barnes, J.:

The above-entitled cases are now being determined de novo by reason of separate appeals on questions of law and fact from the judgment of the Court of Common Pleas of Franklin county, Ohio.

By stipulation it is agreed that the transcript of docket and journal entries, original papers and transcript of evidence as filed in a single case may be considered as filed in each of the separate appeals without the necessity of making and filing separate transcripts, original papers, etc.

In effect, this means that the several appeals are consolidated and one opinion shall be determinative of each and all of the cases.

(Note—Subject headings and emphasis throughout the opinions have been supplied by counsel for respondent.)

This is the second time this case has been in our court. At a former term we reviewed a judgment of the Common Pleas Court, determining the issues in favor of one of the defendants and dismissing plaintiff's petition.

At that time we reversed the Common Pleas Court for the reason that the court made its finding and decree without permitting plaintiff to present its evidence upon a vital issue in the case. Before the cause came up for second trial the principal defendant, Grace D. Backenstoe, had deceased, and the action was revived against her next of kin.

The second trial resulted in a finding and a judgment for the plaintiff and ordered a partition of the 17 tracts of real estate specifically described in the petition. Thereafter, the requisite steps were taken through which the action was carried to our court through separate appeals on questions of law and fact by certain defendants, all being similarly effected by the judgment of the trial court. As heretofore stated, the action was one for partition, but when the issues were finally joined the entire controversy resolved around the question as to whether or not Maurice Patrick Murnan and Grace D. Murnan, referred to in the petition as Grace D. Backenstoe, were married at the time of Pat Murnan's death.

(The Pleadings and Issues.)

As against the defendant, Grace D. Backenstoe, plaintiff in his petition alleged that Grace D. Backenstoe, who claims some interest in the premises described in the petition, had been in possession thereof since the death of Pat Murnan, May 12, 1937, and during such time had collected the rents and profits therefrom without accounting, and will continue so to do unless otherwise ordered by the

court. In the prayer of the petition it was asked that Grace D. Backenstoe be required to set up what, if any, interest she claimed in the premises, and that the same be declared void; that she be required to account for the rents and profits received by her; that a trustee be appointed and for other relief.

As against all other defendants the prayer was for partition.

Plaintiff's petition was filed February 28, 1938, and on March 31, 1938, Grace D. Backenstoe filed answer. The answer in substance averred that many years ago she was Grace D. Backenstoe, and under that name is made one of the defendants in the cause.

"Further answering, this defendant says that she is the surviving spouse of one Maurice Patrick Murnan who died intestate on May 12, 1937, owning certain real estate; that said Maurice Patrick Murnan, deceased, leaving no parent surviving him and leaving only this answering defendant, Grace Murnan, as his surviving spouse, that as such this defendant is the only heir at law and next of kin, and by virtue of that relationship this answering defendant inherits from Maurice Patrick Murnan all of the real estate of which he died seized."

In the prayer it was asked that plaintiff's petition be dismissed, etc.

Prior to the first trial in the Common Pleas Court counsel for plaintiff and some of the claimed defendant heirs duly took the deposition of Grace D. Backenstoe at her then residence known as Graceland, and located on North High street, Worthington. At the time this deposition was taken Grace Murnan was sick in bed with what proved to be her last sickness. Her counsel presented to the court a medical certificate from her attending physician to the

effect that she was not physically able to attend the court hearing. However, no postponement of the hearing was requested on this account.

Following her death and the revivor of the action, several of the new defendants, claiming to be heirs of Grace Murnan, filed answers. These several answers restated the substances of the answer of Grace Murnan and in addition they contained a general denial of plaintiff's petition. It will be noted that the answer of Grace Murnan did not contain a general denial of plaintiff's petition. We mention this at this time since it is urged that the state of the pleadings controls the question of burden of proof. This question will be discussed more fully later in the opinion.

On February 24, 1939, Mary Meyer, a claimed direct descendant of Maurice Pat Murnan, filed an answer and cross-petition which, in addition to the requested partition of the 17 different tracts of real estate described in the petition, also described and asked partition of the North High street 71-acre farm, known as Graceland.

The cross-petition also asked for the appointment of a receiver, setting out that since the death of Grace Backenstoe her executor had been collecting the rents and profits from all the real estate referred to in the petition and cross-petition. At the time of the filing of the cross-petition by Mrs. Meyer the recorded title to Graceland was in the name of Grace Daugherty Murnan, the deed therefor being from Maurice Pat Murnan to Grace Murnan, his wife, dated March 17, 1922, but not recorded until after the death of Pat Murnan. It was the claim of the cross-petitioner that it had not been delivered prior to the date of death of Pat Murnan.

The latter had acquired the property in 1919 by purchase.

While we are on the subject of the show place known as Graceland, we might say that the evidence relative to the execution and delivery of the deed from Murnan to his wife, Grace Daugherty Murnan, is amply supported, and therefore we need give no further consideration to this particular tract of land sought to be brought in for partition under the cross-petition.

However, following the filing of the cross-petition the trial court appointed a receiver for the seventeen tracts in the person of R. W. Kilbourne, who at the time was also acting as the executor of the Grace Daugherty Murnan estate.

With this brief history of the issues joined under the pleadings we now come to a consideration of these factual issues with the attending procedural questions. By stipulation of counsel it was agreed that a transcript of the testimony taken before the trial court, supplemented by such additional testimony as either side might desire to present, either as depositions or in the form of depositions, including identified exhibits, should constitute the evidence in our court. For convenience it was again agreed that this evidence would be divided into four volumes: Volume I, consisting of 292 pages, was the evidence presented to the trial court; Volume II, containing 172 pages, plus exhibits, and containing testimony of 14 persons on behalf of appellants; Volume III, consisted of additional testimony of appellants taken by depositions at different times and described as Detroit, Michigan, depositions and Cleveland deposition; Volume IV contained identified exhibits of former volumes and two depositions, one by plaintiff and the other by defendant, taken at Flagstaff, Arizona, being

the testimony of Miss Mary P. Lewis, present clerk of courts of Flagstaff, Arizona, and also the extended testimony of some other witnesses.

It at once becomes apparent that the reading of this mass of testimony is a laborious task. However, we have waded through it and read every word of it. The briefs of counsel are very helpful in that they have brought to our attention the pertinent court decisions not only in our state, but also in sister states, and in addition have at length copied excerpts from the testimony of practically all the witnesses. Several briefs also contain indexes, but we are sorry that we are unable to compliment this effort If there is anything we dislike, it is making up an index in alphabetical order. What we desire is topical headings and thereunder references in chronological order. If counsel are interested in what the court thinks is the most helpful form of brief we would refer them to Rule VII of the court.

(The Burden of Proof.)

Before we take up an analysis of the evidence it is proper to determine the controverted question of "burden of proof."

It is the claim of plaintiff, since there is no dispute that the petition correctly lists the blood relatives of Pat Murnan and the degree of kinship, that the claim of Grace Murnan and her privies that she was the widow of Pat Murnan, constitutes an affirmative defense and therefore the burden would be upon her to establish that she was his widow. On the other hand, it is the claim of defendant in this court (although not very seriously contended in the lower court) that merely establishing relationship does

not establish heirship, and that since the petition alleged that Mrs. Murnan was in possession of the premises sought to be partitioned, the plaintiff and his co-relatives would only become heirs after other classes, including the widow would be eliminated.

We think a rule of reason, as well as the authorities support the conclusion that in the instant case the burden of proof is upon the plaintiff.

Generally the burden of proof is upon the plaintiff a or at least it is on the person who holds the affirmative i any controverted question. When the burden of proof i established under this rule, it never changes, although there may from time to time be a change as to the obligation of going forward. This frequently happens where the strict observance of a rule of proof might require a party to prove a negative, but even when these situations arise the burden of proof is not changed. We are unable to agree with counsel for the plaintiff that the answer of Grace Murnan, by reason of not containing a general denial was in effect an admission of the allegations of plaintiff's petition. The effect of her answer was to challenge the allegations of the petition that the plaintiff and the groups referred to in his petition were the heirs of Pat Murnan. If Grace Murnan was the widow, the plaintiff and defendant groups similarly related could not be heirs. The classification into which plaintiff seeks to bring himself and certain of the defendant groups is subdivision 6 of Section 10503-4, General Code, which reads as follows:

> "6. If there is no spouse, no children or their lineal descendants, and no parent surviving, to the brothers and sisters, whether of the whole or of the half blood of the intestate, or their lineal descendants, per stirpes."

Before relatives can be considered heirs, all the persons mentioned under subdivisions 1, 2, 3, 4 and 5 must be eliminated. The first five words under subdivision 6 read, "If there be no spouse." The mere allegation of the petition, either directly or indirectly, that there was no spouse can not establish this material fact when a named defendant comes in and files answer averring that she is a surviving spouse. Added reason for the rule in the instant case is the fact that the petition alleges that this defendant was in possession since the death of Pat Murnan and collected the rents and profits.

Sincerity of belief on the part of plaintiff and kindred defendant groups that the defendant Grace was not the spouse would not alter the rule of proof.

The further fact that under some situations this rule would place upon a claimed heir the burden of proving a negative and require making inquiry in every country and city in the United States and all foreign countries is not persuasive. Even so, we can not determine that the difficulty in procuring evidence changes the burden of proof. In practical effect we doubt if any situation would ever arise as is apprehended under the above situation.

We have been referred to the following authorities which we think amply support our conclusions:

Sorenson v. Sorenson, 68 Neb., 483 (94 N. W., 540);
In re Evans Estate, 291 N. W., 460 (Iowa, 1940);
Wherman v. Savings Bank, 259 N. W., 504 (Iowa 1935);
Boulder v. McIntyre, 119 Ind., 574 (21 N. E., 445, 1889);
Schuhart v. Schuhart, 61 Kan., 597 (50 L. R. A., 180, 1900);
Gibson, Admr., v. Commonwealth, 257 Ky., 487 (78 S. W. (2d), 336);
Hopkins v. Hopkins, 287 Mass., 542 (192 N. E., 145);

Voliotes v. Ventorria, 86 N. H., 52 (161 Atl., 921)
Kellog v. Lumber Co., 44 S. W. (2d), 742;
Bishop on Marriage and Divorce, 6th Ed., Sec. 457
18 C. J., Descent and Distribution, Secs. 124, 126, 129
18 R. C. L., p. 428;
Emerson v. White, 29 N. H., 482;
Mitchell v. Thorne, 134 N. Y., 536 (32 N. E., 10);
Savery v. Taylor, 102 Mass., 509;
Thompson on Real Property, Vol. V, Sec. 2445, p
199;
Proctor v. Lowe, 105 N. J., 506 (148 Atl., 787, 1930)

We will not add to the length of this opinion by makin quotations from the above cited authorities, **but do sa very emphatically that the cases unequivocally support ou conclusion that the burden of proof in the instant case i upon the plaintiff.**

Plaintiff-appellee and other claimed heirs similarly situ ated, through their counsel, urge very strenuously and con vincingly that Maurice Patrick Murnan and Grace Daugh erty Backenstoe were never married. This claim is base on two distinct reasons: first, that Grace Daugherty, many years ago, was married to one Backenstoe, and that no lega divorce having been obtained, she is still the wife of Back enstoe and therefore, under the law, would be unable t legally contract a marriage with Pat Murnan.

As a second claim it is urged that the evidence conclu sively establishes that no marriage contract, either cere monially or at common law ever existed between Maurice Pat Murnan and Grace Daugherty Backenstoe.

We take these questions up in the above order.

(The Backenstoe Divorce—1912.)

The evidence conclusively establishes that Grace, wh was born Daugherty, many years before her acquaintanc

with Maurice Pat Murnan, was married to George Backenstoe. In the year 1912, she brought an action in the Insolvency Court of Cuyahoga county for a divorce against her then husband, George Backenstoe. Personal service was not obtained and an affidavit was filed in the usual form for service by publication. This affidavit, duly signed by Grace Backenstoe, was sworn to before a notary public who was her acting attorney in the divorce action.

In December of 1912, the cause came on to be heard and a divorce was granted to Grace Backenstoe. It is now urged that the Insolvency Court of Cuyahoga county had no jurisdiction to entertain the action for divorce for the reason that no legal affidavit had been filed as a condition precedent for service by publication.

It must be conceded that Grace Backenstoe's attorney did not have the authority under the then existing law to act as a notary public in swearing her to the affidavit as a predicate for service by publication. See the following sections: 11524 G. C., 11527 G. C., 11532 G. C.

Counsel for appellee in support of their claim that the divorce could not legally be granted, cite the following authorities:

State v. Jackson, 36 O. S., 281;
Beck v. Beck, 45 O. App., 507;
North Star Lbr. Co. v. Johnson, 196 Fed., 56;
Kingsborough v. Tonsley, et al., 56 O. S., 450.

The case of Beck v. Beck, supra, is very similar except in that case it was a direct attack and therein the court held that the court was without jurisdiction of non-resident defendant in divorce action. On page 510 of the opinion, near the bottom of the page the court calls attention: "This being a direct attack upon the judgment complained of," etc.

The first case cited was a criminal action charging per jury. The pertinent question was as to whether or not the officer purporting to administer the affidavit had the au thority so to do. Determining that no such authority ex isted, there could not be perjury. (Other cases cited indi cate that they involved direct attacks.)

We are referred to the case of Hudson, Admr., v. Owens Vol. 28 O. L. R., 221, decided December 17, 1928. This was decision by the Court of Appeals of the Eighth District opinion by Vickery, J. The factual situations are identical with the instant case. The affidavit for service by publica tion was verified by the attorney acting as a notary public The syllabus presents an understandable history with the legal announcement:

> "A resident of Cleveland, nine years before his death, on notice by publication, procured a divorce from his wife with whom he had formerly lived in Georgia. Subsequently, the wife appeared in Cleve land, and brought an action for alimony without ask ing that the decree of divorce be disturbed, and the court awarded her $1,000.00 which was paid. Follow ing the death of the husband, an administrator was appointed for his estate, which the former widow caused to be set aside and letters issued to herself on the ground that she was the widow of the decedent.
>
> "Held: the conclusiveness of the decree of divorce was in no way questioned by the action of the Com mon Pleas Court in entertaining the wife's action for alimony, and could be challenged or reversed only by direct action, brought within the prescribed time, ask ing that the divorce decree be set aside; and the former wife is now estopped from claiming the right to ad minister the estate of the decedent as his widow."

Counsel for appellee argue that the legal pronouncement in the Hudson case, supra, was not applicable to the instant case for the reason that the reported case was a review from

a decision of the Common Pleas Court, whereas in the instant case the attempted decree was by the Insolvency Court.

We are unable to see that this distinguishes the two cases. The claim that the Insolvency Court is a court of limited jurisdiction can make no difference, for the reason that it had been granted equivalent jurisdiction to that of the Common Pleas Court. It is quite correct to state that all courts are more or less of limited jurisdiction. The Legislature has the unqualified authority to prescribe the jurisdiction of any and all trial courts. The mere fact that the insolvency court did not have the jurisdiction to enter into all fields to which the right was given the Common Pleas Court could make no difference. The fact that they were given jurisdiction equal to and like the Common Pleas Court in divorce and alimony matters would be all that was required.

The decision of the Supreme Court in the case of Adams, Judge, v. State, ex rel., 104 O. S., 475, is enlightening and in point.

It is our conclusion that the evidence in the instant case sustains the claim of a legal divorce having been granted to Grace Murnan in 1912, at least as against a collateral attack.

This brings us to a consideration and determination of the vital issue in the case.

(The Evidence of Marriage.)

Was Grace Backenstoe Murnan married to Maurice Pat Murnan at the time of the latter's death in 1937? These two people for many years were well known underworld characters in the city of Columbus, Pat was a big gambler and Grace, the madam of a well-established sportinghouse.

Both engaged in a disorderly business, yet each sough to conduct their business in an orderly manner. Neithe was ever arrested. While both were continuous law vi lators, they both were considered unusually honest, pa ticularly among people who considered their respectiv businesses as necessary evils. Pat Murnan was previousl married, his wife having died in about 1912. Grace ha previously been married to George Backenstoe and she wa granted her divorce in November, 1912. During the latt part of the year 1914 or the early part of the year 191 Pat was paying more than usual attention to Grace. I June of 1915 Pat took Grace on a trip to the Pacific coa and the California Exposition. The trip was made b automobile. The acting chauffeur and mechanic wa Homer Byers. Tommy Stewart, a former employee of Mu nan's, also accompanied the party on the trip. During th stay in California Grace was sick and unable to attend th Exposition, except for one-half day. During the latter pa of July the party started back.

When they reached Barstow, California, Pat and Grac on account of the latter's sickness, took the train to Fla staff, Arizona, arranging that the chauffeur and his help would drive the car through the Great American Dese This arrangement placed Pat and Grace in Flagstaff a da or so ahead of the chauffeur. According to the testimon of Grace given in her deposition taken during the ye 1939, it was during this day or two's stop in Flagstaff th she and Pat were married. The marriage took place befo a justice of the peace. Pat made all the arrangements.

Following the deposition evidence of Grace, giving Fla staff, Arizona, as the place of marriage, and July, 1915, the time, counsel representing both sides of this contr

versy investigated the marriage license records in the proper office in Flagstaff, Arizona, and through deposition evidence subsequently taken developed the fact that the records do not disclose any marriage license having been issued to Pat Murnan or Grace Daugherty. Starting from this point both sides have exhausted their efforts in seeking supporting evidence to sustain their respective contentions. The Arizona statutes in effect in 1915 were introduced in evidence. One of the specific provisions of the Arizona statute is not to recognize the common law marriages in that state. The pertinent sections provide for the issuing of licenses and designate the individuals who can perform marriage ceremonies.

It is also a requirement that the individual performing the ceremony shall have the contracting parties sign at the proper place and he shall certify the fact of their marriage and return the certificate to the clerk's office where it shall be recorded in a permanent record.

While the different sections of the Arizona Code provide much detail in the interest of having and preserving records, yet, as we view it, the only thing essential to constitute a ceremonial marriage was the issuing of a license to the contracting parties and the performing of the ceremony by a designated person under the statute. While the performance of all the ministerial duties would be important to all couples marrying in the state, yet the failure to perform mere ministerial duties would not void a ceremonial marriage, if, in fact, it was duly performed. This principle of law is directly announced by Section 1217 of the statutes of Arizona. To the same effect, see Section 3844 of the Revised Code of Arizona.

Of course, the presumption is very strong that the proper officer of the state of Arizona took care of his rec-

ords in a proper manner, and the fact that the bound volum contains no record of a license having been issued to Pa Murnan and Grace Daugherty argues very strongly tha no such license was ever issued. Considering the ver full and complete testimony of Miss Mary P. Lewis, cler of courts of Flagstaff, Arizona, as presented in her depo sition, we necessarily arrive at either one or the other o the following conclusions:

First, no marriage license was ever issued to Pat Murna and Grace Daugherty; or, second, the county clerk faile to make a record of the issuance of such a license. Thi failure might be wilful or accidental. For instance, if Pa Murnan went into the clerk's office and procured a licens to marry, such a license could be issued by the clerk with out at the same time making a record of the fact in suc issuance.

After the justice of the peace performed the marriag ceremony he could deliver the marriage papers to the con tracting parties, although there was a statutory require ment that he make a return to the clerk's office. The count clerk testifies that it sometimes happens that the perso performing the marriage ceremony does deliver the mar riage license containing the certificate of the marriag ceremony to the contracting parties to be by them delivere to the county clerk. If the contracting parties, entruste with the delivery of the certificate of marriage to the count clerk, fails so to do, this would not void the marriage, bu would merely negative the desired record.

The chauffeur, Homer Byers, testifies that when he ar rived at Flagstaff with the big, open Packard car and drov it into the garage, that he received some information fro the garage man that caused him to go to the court hous

and into the clerk's office; that he inquired about a marriage license between Pat Murnan and Grace Backenstoe, and that the clerk threw out a document and then and there he saw and read the marriage license contract between Pat Murnan and Grace Daugherty. The difficulty with this witness' testimony is that he saw too much. Many of the things which he says he saw and read on the document are not contained in Arizona marriage licenses.

It sometimes happens that the clerk before issuing a license required the applicant securing the license to sign an affidavit. According to the testimony of the county clerk, the affidavits are most frequently required where there is some doubt as to the age of one or both of the contracting parties, although sometimes they are required in other instances. These affidavits are not required to be recorded, nor are they required to be preserved. The present county clerk was able to find in her office for the year 1915 an average of one affidavit to every six licenses. This affidavit form would more nearly conform to what Chauffeur Byers says he saw and read in the county clerk's office, but there would still be a substantial variance. One of the incidents in his testimony is the fact that he states that the contract of marriage was between Pat Murnan and Grace Daugherty. We think from other parts of his testimony he had always known her as Grace Backenstoe.

An effort was made to impeach the testimony of the witness by showing that many years previous when the trial court was prosecuting attorney, the witness testified falsely in a certain criminal action. The form of this inquiry indicates that counsel was propounding the impeaching questions from a transcript record, possibly a bill of exceptions. The witness did not admit that he had made

the allegedly false statements, but said that he could n remember what his testimony was in that particular cas The groundwork was clearly laid to present the impeachin testimony, but for some reason this was not done. It w the view of the trial court that this witness was not worth of belief. If we were reviewing as an error proceeding, w would accept this view of the trial court without questio but since we are determining the matter de novo, we can n overlook the omission of the impeaching testimony.

After the party left Flagstaff there is evidence of a incident that happened at Colorado Springs. Murnan an his party had stopped in front of the Antlers Hotel. M Charles Schaefer, a merchant tailor of 52 East Broa Street, Columbus, Ohio, had been to the California Exp sition with about 150 members of the local Shrine. H stopped at Colorado Springs on his return and gives th date as July 27. Mr. Schaefer saw and recognized M Murnan, stepped out of the car and spoke to him. M Murnan immediately introduced him to Mrs. Murnan. "H says, 'Charley, we are married'; and I said, 'Is that right He said, 'Yes, we were married in Arizona, and are on o wedding trip.' "

The next episode brings us to Columbus, Grace retur to her house at 140 Front Street and Pat does to h mother's. The evidence is uncontradicted that upon t return to Columbus no public announcement was made the claimed marriage. Quite a few witnesses are call who testified that both Grace and Pat at different tim confided in them as to their marriage, but generally ask them not to say anything about it. The reason for kee ing it secret was generally understood to be on account their respective businesses. At this time Pat was in t

taxicab business. According to the witnesses it was the view of Pat and Grace that a public announcement would be injurious to the taxicab business.

One of the incidents of letting the marriage be known to friends was a happening in the fall or winter of 1915 when Pat and Grace made one of their frequent trips to Mt. Clemens, Michigan. At that time there was living in Detroit a Mr. and Mrs. Carey, both of whom had formerly lived in Columbus. On the way to Mt. Clemens the Murnans stopped at the Carey home and invited them to a fish dinner on the following evening at Mt. Clemens. They accepted the invitation and Pat's chauffeur came in for them, a distance of about 27 miles. Just as they were seated at the table Pat told them this was their wedding dinner for them, further stating that they had been married on their trip during the summer. Carey said that Pat told him about the officer that performed the ceremony, but that he could not recall the peculiar name that he gave to him, but he said that he gave him a tip of $20.00, when he was only supposed to pay 50 cents or a dollar.

Another incident of moment is presented through the testimony of Louis Novario. He now lives and runs a bowling alley in Cleveland, but in years past was frequently in Columbus. As a youngster he was a page in the Ohio Senate and later indicates he was a right-hand man of Theodore E. Burton during his candidacy for the United States Senate. Later the witness was connected with the State Highway Patrol and worked out of the office of Governor Bricker. His first acquaintance with Pat Murnan was when he was making the arrangements for taxi service for Senator Burton. During the time he was living in Columbus he also became acquainted with Grace Backen-

stoe. He would go to her place very frequently and drink with her. He relates an occasion in December, 1915, when he was in this house of Backenstoe's on Front Street with another girl, and the three of them were in the recreation room, drinking; that Pat walked in and joined them. The witness at this time says that he said to Pat, "What is this that I hear about you two being married," Grace then spoke up and said, "We can trust Louie," and the four of them then proceeded upstairs to Grace's very beautiful bedroom; that she went to a safe or a panel in the wall and got out a paper and showed it to him, and he said it was the marriage license of Maurice Pat Murnan to Grace Daugherty. He says that he asked about the name "Daugherty," as he had always understood the name to be "Backenstoe," but she told him that she had been restored to her maiden name of "Daugherty." The witness says that Pat and Grace told him that they were married while they were away; further, that on this occasion Pat asked him to get in touch with the diamond merchant from whom Grace had been buying her diamonds, which he did, and it resulted in Pat buying for her a seven-carat diamond, and at the same time or a little later, a very beautiful and large diamond lavaliere.

The testimony of this last witness was only discovered after the case was appealed to our court. He was not a witness in the trial court. This testimony is strongly supporting.

A longtime employee as chauffeur, both before and after 1915, testified that during that year when he was working in Pennsylvania he received a post card from Pat and Grace announcing their marriage on their western trip.

Anna B. Beyerly was also called as a witness. She had lived a very active life and at the time of taking her testi

mony was a woman in advanced years. Prior to 1915 she owned a farm north of the city and approximately two miles from the farms subsequently purchased by Pat Murnan. Some two or three years prior to 1915 Pat Murnan arranged with Mrs. Beyerly to take care of two registered calves. After this arrangement was made he would frequently drive out to see them. Some time after the middle of 1915 he drove out and had Grace in the car. Mrs. Beyerly testifies that he called her over to the car and introduced Grace as his wife. This acquaintance was continuous after the Murnans moved out to Graceland up until the time of the death of Pat Murnan.

Margaret Lunn was also called as a witness on behalf of the defendant. Mrs. Lunn was a niece of Pat Murnan. She testified that shortly after the birth of her daughter on August 31, 1919, she visited her grandmother, Mrs. Margaret Galvin, on one occasion when Pat was at the home. Mrs. Galvin was Pat's mother. She further testifies that this was about the time that the Murnans had moved to the farm. She further testifies that on this occasion Mrs Galvin asked Pat if he was married and he answered, "Yes, mother, I am." "And he made a motion to get papers out of his pocket. Grandma says, 'It isn't necessary to show me any papers. If you say you are married, Maurice, that is all that is necessary, because you never told me a lie in your life.' "

Counsel for defendant also called as a witness a man who had been in the saloon business and he testified that in 1915 Pat told him that he and Grace had been married on their trip out west and at that time treated all patrons then in the saloon.

There are several other persons to whom either Pat Grace or both, confided that they had been married Arizona on this western trip.

Aside from the more or less intimate friends or asso ates, the public generally were not informed as to t claimed marriage between Pat and Grace.

They continued to act as single persons. Grace's spo ing house was continued under the name of Grace Back stoe. Deeds or other documents were signed and execut as single persons. Their bank deposits and signature ca were just the same as before. Within a year or two af this claimed marriage, Pat negotiated a trade of two pie of real estate. He executed the deed as a single man, c veying his property to his grantee and the second party the trade executed the deed to Grace Daugherty, wh became the residence of Grace's mother, and remained until the latter's death.

In 1917, after we became involved in the World W the Government issued an order prohibiting the operat of houses of ill fame within five miles of a military cant ment. This caused Grace, as well as all others in like bu ness, to close their business and this occurred in Aug 1917. Thereafter, for a period of time she continued operate the place as a legitimate rooming house, but so time later, the exact time not being known, the busin was closed up in its entirety. Sometime in 1919, a mar change arose in the lives of these two people. This the time they moved to the 71-acre farm known as Gra land. Throughout the record it is spoken of as a sh place, and as being located in an aristocratic distr From this time on all deeds and other documents execu by either were executed as a married person, with rele

of dower by the other. There are some ten or eleven instances where deeds were executed. One of the first deeds was that for Graceland and purported to be a deed from Pat Murnan to Mrs. Grace Murnan, his wife. From this time on there was presented a procession of witnesses from all walks of life, supporting the claim that Pat Murnan spoke of and introduced Grace as Mrs. Murnan.

There was also evidence presented that Grace sold her property on Front Street to the Lazarus Company for a consideration of something more than $50,000.00, and shortly thereafter and during the same year took out a building permit to build a $50,000.00 structure on one of Pat's lots. As we understand, this is one of the properties sought to be partitioned at this time. Evidence is introduced that Pat spoke of this business building as belonging to Grace, although it now develops that the title was in Pat.

This record presents much additional evidence supporting the respective claims of the litigants, but it would merely be cumulative in character and we do not deem it advisable to further review the evidence.

We find little, if any, controversy as to the applicable law. There is a marked difference as to its application.

(The Law of Marriage.)

We start with the well-recognized principle that the lex loci is controlling on marriage contracts as well as all others. Under the laws of Arizona common law marriages are not recognized. Under the situation in the instant case it is our judgment that the marriage of Pat and Grace must be based on the proof of a ceremonial marriage or none at all.

It would not always follow that claim of ceremoni marriage would defeat proof of common law marriag For instance, where one of the contracting parties honest believed that a ceremonial marriage had been performe and later discovered that there was some defect whi went to the substance, then and in that instance a theo of common law marriage might obtain.

One of the latest cases decided by our Supreme Cou is entitled In re: Estate of Redman, 135 O. S., 554. Th decision is a per curiam. This case makes the pronounc ment that to constitute a common law marriage the esse tial elements must be shown by clear and convincing ev dence and an agreement in praesenti is necessary.

A first reading of this case might indicate that the ru of law requiring common law marriages to be support by evidence of agreements in praesenti was being emph sized. A careful study will disclose that the peculiar fa being considered was responsible, for the court's pronounc ment. In this reported case the claimed husband, who w seeking curtesy in his wife's property had presented ev dence that the two had lived together as man and wife a had been introduced to their friends as such. However, t husband testified in answer to a question put to him cross examination as to whether or not he and his pa mour had ever talked about marriage, said that they h talked about it, but "not for them." This testimony at on refuted any claim of marriage and occasioned the cour pronouncement of the rule requiring agreements praesenti.

This in no sense was a new rule. The Supreme Cou had made the identical pronouncement in the case of U benhower v. Labus, 85 O. S., 238. On page 248 of the op

ion Judge Price quotes from the case of Bruner v. Briggs, 39 O. S., 478:

"A marriage in fact may be established by showing that they lived together and cohabited as husband and wife for a series of years, that they always recognized and treated each other as such, and that they were so treated and reputed in the community and circle in which they moved, although no record evidence was offered, nor the evidence of any witness who saw them married was given. Such is competent and its sufficiency to establish the fact of marriage is for the court or jury trying the issue to determine."

The above in effect refers to a rule of proof.

To the same effect we quote from Ohio Jurisprudence, Vol. 26 (Marriage), Section 80:

"A ceremonial marriage may be proved by admissions of the parties, if no record is made, or if records are made, but are subsequently lost or destroyed. Such declarations and admissions of the husband and wife are generally admissible, not as hearsay evidence, but as original evidence of facts from which the marriage may be inferred. Such admissions may often establish a prima facie case, and are always admissible in evidence as tending to prove the fact of a disputed marriage, and they have been held, in some civil cases, to establish an estoppel, where undenied."

Also, see Section 81:

"It is a general rule that marriage may be shown by habit or repute, and in Ohio, that a marriage may be proved by reputation, as, for example, by a reputation of living together as husband and wife; evidence of cohabitation as husband and wife, and of mutual recognition of that relation by the parties, is competent as tending to prove the marriage. Thus, when the right to succession of an estate depends upon the existence of a marriage, such marriage may be proved by the reputation of the parties."

"A ceremonial marriage may be proved by cohab
tation, when no record is made, or, if made, when it
lost or destroyed. A common law marriage may
established by direct evidence of the contract or, as
usually done, by proof of cohabitation, and reputati
thereof, sufficient to establish the marriage. Eviden
of cohabitation, and reputation thereof, is admissib
in favor of the wife, or her child, in order to prove
common law marriage, even though the wife testifi
to the making, and the terms of the contract, in ver
de praesenti. In other civil and criminal cases, ev
dence that the parties have lived together as husba
and wife is always admissible. The authorities a
numerous to the effect that in a civil action, a marria
may be shown by reputation and continued cohabit
tion."

The Legislature of Ohio has by enactment prescribed
rule of evidence on the question of marriage.

"Section 11989. Evidence of Marriage. Proof of
habitation, and reputation of the marriage of t
parties, is competent evidence to prove such marria
and within the discretion of the court, may be sufficie
therefor."

We take the following from Ruling Case Law, Vol.
"Marriage," Section 62:

"Cohabitation and repute do not constitute a m
riage, but are only evidence tending to raise a p
sumption of marriage, of more or less strength acco
ing to the circumstances of the case, and which
creases with the lapse of time the parties are cohab
ing as husband and wife. The presumption of m
riage, from a cohabitation apparently matrimonial,
one of the strongest presumptions known to the l
but it is not conclusive and may be overcome by co
petent evidence."

**"An attempted ceremonial marriage in good fa
entered into by one of the contracting parties, e
though irregular or void will, through the act
agreement to be married and continuous cohabitat
establish a valid marriage at common law."**

This is the pronouncement of our Supreme Court in the case of Johnson v. Wolford, et al., 117 O. S., 136.

In the light of the evidence in the instant case construed in connection with the existing law, how stands the case at bar? The long-continued cohabitation as man and wife and generally so recognized in the community and even by at least one of Pat's nieces who addressed Mrs. Murnan as Aunt Grace, strongly supports the claim that Pat and Grace were husband and wife. The statement made to numerous friends that they were married in 1915 in Flagstaff, Arizona, presents the claim of a ceremonial marriage. **The evidence is very strong that Grace, at least, thought the marriage in Flagstaff was regular in every particular. She testifies that Pat attended to all the details. This means that he procured the license, secured the magistrate and took care of the papers. If there was any irregularity Pat might be in position to have knowledge thereof and Grace would not. We do not mean to say that there were any irregularities, but are merely canvassing the possibilities. Mere irregularities, even though they might deny a ceremonial marriage, would not refute a common law marriage under the decision of our Supreme Court in the case of Johnson v. Wolford, 117 O. S., 136.**

Does the fact that the marriage records in the Supreme Court of Flagstaff, Arizona, fail to show that any marriage license was ever issued to Pat Murnan or Grace Daugherty overcome the claim of marriage as advanced by the defendants? This evidence, coupled with the fact that no marriage certificate was introduced in evidence, presents a very strong denial of marriage, but it is not conclusive. In addition to the numerous statements made by Pat and Grace to close friends that they were married in Flagstaff, Arizona, we have the evidence of two witnesses who say

they saw the marriage contract. It is true the evidence o
the chauffeur who testifies that he saw the papers in th
clerk's office in Flagstaff, is of doubtful veracity. In hi
desire to help, his testimony as to what he saw and rea
is not supported by the evidence of what such document
would contain. We are not prepared to say that this wi
ness did not go to the clerk's office, nor would we want t
say that he did not see something, but even if this testimon
be ignored in its entirety we still have the testimony of a
other witness who says that in December of 1915, he sa
and read the marriage license between Maurice Pat Mu
nan and Grace Daugherty. Could it be possible under th
plan of operation in the office of the clerk of courts
Flagstaff, Arizona, that a marriage license was issued, b
never was recorded? The marriage license blanks were
identical form as the marriage record. These blanks we
not taken from the record and could be very readily ma
out and delivered to the contracting party with the idea
recording when the return was made by the person solem
nizing the marriage. Apparently, it was the practice
make the return on the same blank. It is in evidence th
sometimes the person performing the marriage ceremo
did not make the return himself, but entrusted the doc
ment to one or the other of the marrying parties to ma
the return by him or her. If the marriage contract conta
ing the marriage certificate was not in fact returned to t
clerk's office this might be a solution as to why the sa
never got into the record. It is also necessary to meet t
evidence that the cash book in the clerk's office fails
show any entry of the payment of the usual fee upon t
issuing of a marriage license. This is difficult to overcon
but may be the result of carelessness or even by desi

The individual who was clerk of the courts in 1915 is not now in office and his present residence is unknown. The Flagstaff magistrate who was in office in 1915 is now deceased.

Through the deposition of the present county clerk in Flagstaff there was given a very full and detailed description of the marriage records from 1912 to 1920. The volume is substantially bound and paged from 1 to 590. Each page contains the blank marriage license and blank marriage certificate. These pages are securely bound and are not loose-leaf. It was disclosed from the evidence that another license issued in June, 1915, did not get into the record until the early months of 1916. This disclosed that the system was not foolproof. If in the instance where the license was issued in June, 1915, it did not get into the records until 1916, it may be an explanation why in the instant case there is no record at all.

We are constrained to the view that plaintiff has failed to establish by a preponderance of the evidence that he and defendant group similarly related are surviving heirs of Maurice Pat Murnan.

We make the factual determination that Maurice Pat Murnan and Grace Daugherty were husband and wife at the death of Maurice Pat Murnan, and by reason thereof Grace Daugherty Murnan was the sole surviving heir.

Plaintiff's petition will be dismissed and costs adjudged against plaintiff-appellee.

Cause remanded to the Common Pleas Court for further proceedings according to law.

Geiger, P. J., concurs.

Hornbeck, J., dissents.

Geiger, P. J., concurring:

This case has been much discussed and generousl briefed and has resulted in voluminous testimony in th court below. Everyone who has had anything to do wit the case recognizes, not only the importance of the que tion to the parties to the present action, but the difficulti that surrounded its correct determination.

Each of the other judges of this court has examined th case and the evidence critically and have arrived at differe conclusions.

One has taken the position that the ceremonial marria alleged to have been consummated at Flagstaff, Arizon has been proved by the requisite quality of evidence.

Another member of the court has taken the position th there is not sufficient evidence to establish either the cer monial or a comman law marriage.

The evidence has been sufficiently reviewed and co mented upon so that no further comment is required.

While the authorities have been cited and quoted some length, it might be well to briefly restate a few of t principles, especially those relating to common law ma riages to support, if possible, the position that I take this matter.

In Umbenhower v. Labus, 85 O. S., 238, it is held:

> "An agreement of marriage in praesenti when ma by parties competent to contract accompanied a followed by cohabitation as husband and wife, th being so treated and reputed in the community a circle in which they move, establishes a valid marria at common law, * * *."

The opinion of the court, delivered by Price, J., revie in detail all the Ohio cases bearing upon the question a I shall not further comment upon them as this is so w done by Price, J.

In re Estate of Redman, 135 O. S., 554, is the latest pronouncement of the Supreme Court upon this subject. The opinion is by the court and there is a repetition of principles of prior decisions and it is there stated that it is well settled in Ohio that to establish a common law marriage all the essential elements of such a relationship must be shown by clear and convincing evidence. This is but a restatement of the former decisions of the court.

The case of Johnson v. Wolford, 117 O. S., 136, establishes the principle that where there has been an impediment preventing the validity of a ceremonial marriage, a valid marriage at common law may be established after the removal of the impediment.

In the case at bar it is contended on one hand that there was a valid ceremonial marriage in Flagstaff, Arizona. On the other hand, it is asserted that there was no such ceremonial marriage. It is conceded that if there was no such ceremonial marriage that the parties may by their subsequent declarations and conduct, properly proved, establish a common law marriage.

It will be recalled that a few days after the incidents occurring at Flagstaff the parties met, at Colorado Springs, friends from Columbus, Ohio, to whom they made the declaration of the fact that they were married, the statement being presumably based upon their supposition that there had been a legal ceremonial marriage.

After their return to Columbus, Ohio, they did not continuously cohabit as husband and wife until 1919 and during that period each made statements incorporated in their several deeds that they were unmarried. After 1919 they openly assumed the relation of husband and wife followed by cohabitation as such and being so treated and reputed

in the community and circle in which they moved, which relation continued until the time of the death of Pat. This, I believe, is sufficient to establish a common law marriage.

One of my associates agrees that a common law marriage might be so established if the statement of one of the parties themselves did not refute this relationship. It is pointed out by this judge that Grace, even after the death of Pat, stated in her deposition that there was no other marriage than the ceremonial marriage at Flagstaff and that such statement can not be reconciled with the claim of a common law marriage. After Grace continued to maintain that the only marriage relation was that established by the ceremonial marriage it is asserted that any claim to a common law marriage must necessarily fail.

After Grace's deposition was taken she died and after her death a witness was produced who stated, in effect, that he was shown a marriage certificate by Grace in the presence of Pat and that he read the same and commented upon the fact that her name as appearing thereon was not the name by which she was commonly known; to which Grace responded that she had, before the ceremonial marriage, secured a divorce from her former husband and had been restored to the name that then appeared in the certificate of marriage.

It must be remembered that each of these parties was engaged in such activities as would produce situations at variance with the normal life of those not so engaged. I am of the opinion that their actions between their visit to Flagstaff and their open cohabitation after 1919, during which time each repeatedly stated in their several deeds that they were single, could well be understood as arising from the doubtful occupations of each and that Grace's explanation that the deeds were so made because of their

several activities and their desire to avoid public comment, furnishes a natural explanation for their statements in this respect.

However, if each knew that they were not married in Flagstaff and each denied that relationship until 1919, the evidence discloses that thereafter they cohabited as husband and wife and by reason of their repeated statement to their friends of that relationship, they were so treated and reputed in the community and the circle in which they moved.

I do not believe that Grace's alleged statement that she was married at Flagstaff and that that was the only marriage contract into which they had entered would prevent a subsequent agreement even so late as 1919 which was followed by cohabitation as husband and wife and reputation as such in the community and circle of friends in which they moved as would prevent the consummation of a common law marriage.

I am of the opinion that the evidence produced might well establish either a ceremonial or a common law marriage and therefore I concur in the opinion so holding.

I likewise concur on all other questions.

Hornbeck, J., dissenting:

I am in agreement that the Backenstoe divorce decree may not be successfully attacked in this proceeding and that the property known as Graceland was owned by Grace at the time of her death.

The burden of proof would not affect my conclusion of the matter wherever it is placed. I appreciate, however, that it may become of prime importance upon a review of our judgment. It may be, that upon the whole case, the burden is upon the plaintiffs, but it is difficult to support

any theory which will enable the defendants, as representatives of Grace, to take a share of the estate here involved unless and until they have established that she, at the time of Pat Murnan's death, was his wife.

Judge Barnes in the majority opinion has set forth the most effective facts and inferences in support of a ceremonial marriage of which the record is susceptible.

Upon the controlling question, the record presents two distinct and different periods affecting the lives and the status of the parties involved and, in my judgment, two insurmountable obstacles to the maintenance of the claim that Pat and Grace were married.

The first period dates from on or about 1915 and ends in 1919. The second period begins in 1919 and ends with the taking of the deposition of Grace.

From June, 1915, the date of the alleged ceremonial marriage, until 1919, there is not one word of documentary proof tending to establish the marital relation between Pat and Grace. All of it is to the contrary. In the ordinary case this class of evidence would not be available to any considerable degree. Here we have it in abundance and it is compelling in probative effect because of the conflict and uncertainty in the word of mouth evidence. Some of the testimony of the holding out of these parties as husband and wife and especially of their living together as such, is of doubtful value. That relating to the vital question of the existence of a marriage certificate is, to say the least, not convincing. The marriage records in the court house at Flagstaff, Arizona, are of major importance, and afford no support whatever for the claim of a ceremonial marriage. The absence of such evidence may be explained only by imputing misconduct, or gross carelessness, to officials

who were charged with the duty of making and keeping these public records. Nothing in the evidence affords sufficient support for such a conclusion.

The records at Flagstaff present the first insurmountable obstacle and preclude, without respect to the burden of proof, a finding that the parties were ceremonially married. Other difficulties of less consequence appear. For instance, during this first period, every instrument, and there are many of them (12 deeds) signed by the respective parties, wherein their marital status is set out, refutes the claim of any marriage up to 1919.

The second period begins in 1919 when Pat acquired the farm in Worthington. From this time and until the taking of the deposition of Grace, every fact appearing in the evidence, written and oral, with one exception, affecting the status of these parties is to the effect that they sustained the relationship of husband and wife. Upon the acquisition of the farm, Pat deeded it to Grace, as his wife, and named it Graceland. They lived in the home at Graceland, as husband and wife, and openly and continuously so held themselves out to the public. Every deed executed by them, or either of them, recited that they were husband and wife. Pat made formal accounting to the Federal Government for income tax purposes and claimed exemptions as a married man. Their business and banking transactions were conducted as husband and wife.

It is inconsistent to say that there was a new and separate contract in praesenti to marry on or about 1919, if the parties then knew that they were ceremonially married. Even this handicap could be overcome by the force of the testimony and a contract implied in fact if it were not for a statement of Grace in her deposition.

Notwithstanding the trend of later decision wherein there has been stressed the necessity of an agreement in praesenti to constitute a common law marriage, this essential may be established by implication. If this were not so, no common law marriage could be proven unless some witness was available to state the terms of the agreement to marry.

The principle is well stated in the opinion in Bruner v. Briggs, 39 O. S., 480:

> "It is now too well settled to admit of dispute, that in all civil actions, when the rights to succession of an estate depends on the existence of a marriage, it may be proved by reputation, declarations and conduct of the parties."

The following authorities recognize this to be the law: 18 R. C. L., 426, 429, 433; Stewart v. Welch, 41 O. S., 483; Duncan v. Duncan, 10 O. S., 181; Wolverton v. State, 16 Ohio, 176; Howard v. Central National Bank, 21 O. App., 74; Jenkins v. Jenkins, 30 O. App., 336; Schwartz v. Schwartz, 13 O. C. C., 62; G. C. 11980.

But all the cases recognize that the contract to marry must appear and the effect of living together as husband and wife, and the holding out of this relationship to the public raises but a presumption of common law marriage which may or may not, under all the facts appearing, be sufficient to establish the marriage.

In most of the Ohio cases one of the parties to the marriage testify to the terms of the contract which it was claimed constituted an agreement in praesenti to marry. In no case has any court found a common law marriage to be proven wherein one of the parties expressly stated that no such contract of marriage existed. This brings us to the second insurmountable obstacle in this case,

ely, the statement of Grace in her deposition that e was but one marriage which was the ceremony per-ned in Flagstaff.

we hold that a common law agreement to marry is blished by the cohabitation and the holding out of e parties, we not only must disregard the testimony ling to establish ceremonial marriage, the most potent vhich is the statement of Grace, but also find either, she was mistaken, or misstating the truth, when she that there was but one marriage. This can not be nciled with the probabilities. Such an event as an eement to marry would make such an indelible im-sion upon the minds of the contracting parties, espe-ly the woman, as that they would never forget it. situation developed by the testimony of Grace gives lication to the law as announced in Dirion v. Brewer, nr., et al., 20 O. App., 298; Holmes v. Pere Marquette Co., 28 O. App., 297; Lumas v. Lumas, 26 O. App., ; the leading case of Umbenhower v. Labus, 85 O. S., and in re Estate of Redman, 135 O. S., 558, in all of ch cases the court emphasized the necessity that, to stitute a common law marriage, not only must there cohabitation as husband and wife, a holding out to public of that relationship, but these acts must follow agreement to marry. Re Estate of Redman, supra, special application. The court found that there had cohabitation between the parties, a holding out as band and wife, but that the parties agreed that mar-e not for them and that they did not desire the status. s latter fact does not appear in the instant case, but , as in the cited cases, the statement of one of the ies to the claimed common law marriage completely

refutes the existence of one of the essential elements to its establishment.

This case is unusual in its complexities and conflicts. No determination which may be made under the facts will completely satisfy the intellect. **The record may not be read without the impression that Pat and Grace were married**, but an analysis of the essential of proof will not, in my judgment, permit of the determination that they were married in any form recognized in the law.

APPENDIX II.

Decision, Finding of Fact—Court of Appeals.

(Rendered on the Seventh Day of April, 1942.)
(46 N. E. (2d), 664.)

By the Court:

The above-entitled cause is now being determined on three propositions (1) application for rehearing, (2) motion for new trial, (3) request for separate finding of facts and conclusion of law.

We will take these up in order.

First, the application for rehearing presents nothing but what was considered in the original opinion and therefore the same will be overruled.

The motion for new trial presents three separately stated and numbered grounds as follows:

> "(1) The findings, decision and decree are not sustained by any evidence, are contrary to the weight of the evidence and are contrary to law.
>
> (2) For several errors of law occurring at the trial prejudicial to the rights of the plaintiff-appellee and to which objections were made by plaintiff-appellee at the time.
>
> (3) For other errors manifest from the face of the record."

We find nothing new in the motion for new trial and we assume that it is presented as a requisite procedural step for further review in the Supreme Court.

The motion for new trial is overruled.

The application to separately state the findings of fact and conclusions of law was presented in time and the provisions of the rules of our court relative thereto complied with.

Counsel for appellees in compliance with such rule have presented to us a suggested finding of fact and determination of law and prior thereto submitted same to opposite counsel.

Counsel for appellant present their objections to the suggested findings and also for the consideration of the court submitted a draft of what they consider the court's findings should be.

The draft tendered by counsel for appellees in many particulars does not conform to the opinion of the court and consequently we cannot adopt same.

We find that the draft submitted by counsel for appellants does conform to our opinion and therefore the same is adopted in its entirety.

The following are our findings:

1. That Maurice P. Murnan died on or about May 12 1937, intestate and seized of the seventeen parcels or tract of real property described in plaintiff's petition, to which reference is made.

2. That said Maurice P. Murnan died intestate leaving his widow, Grace Murnan, surviving him.

3. That the personal property in the estate of Maurice P. Murnan is sufficient to pay all debts and claims against said estate.

4. That the nearest blood relations, but not next of kin of the said Maurice P. Murnan are the persons named as such in plaintiff's petition, to which reference is made except that Clara Collins named therein has since died leaving as her only next of kin the defendants, Margaret Fornan and Mary Martin; and that the correct name of the defendant, Margaret Fornan, is Margaret M. Catcher.

5. That on March 17, 1922, said Maurice P. Murnan by deed then delivered conveyed to Grace Daugherty (Backe

stoe) Murnan the real estate described in the cross-petition of Mary Meyer herein, to which cross-petition reference is made.

6. That as the surviving spouse and sole heir of said Maurice P. Murnan, the said Grace D. Murnan acquired under the statute of descent and distribution the title in fee simple to the seventeen parcels of land described in the petition herein, and of which she had possession from the date of his death on May 12, 1937, to the date of her death on November 16, 1939.

7. That after the death of said Grace D. Murnan, Raymond W. Kilbourne was duly appointed and qualified as the executor of her estate, and filed his answer therein to the cross-petition of Mary Meyer.

8. That since the death of said Grace D. Murnan, said Raymond W. Kilbourne, first as executor of the estate of said Grace D. Murnan and later as receiver duly appointed by the Common Pleas Court in this cause, has had the possession of the seventeen parcels of real estate described in the petition herein and collected the rents and profits therefrom until deprived of the possession thereof by the final decree and judgment of the Common Pleas Court in this cause, from which decree and judgment the several appeals herein were perfected to this court.

The following are findings in relation to the marriage between Maurice P. Murnan and Grace (Daugherty) Backenstoe Murnan:

9. That on and prior to July 15, 1915, said Maurice P. Murnan was a single man, his former wife having died in February, 1913, and Grace Daugherty (Murnan) was a single woman, having been divorced from her former husband, George Backenstoe, in November of 1912.

10. That in 1912, Grace Daugherty Backenstoe was the wife of George Backenstoe, and in August of said year filed an action against him for divorce in the Insolvency Court of Cuyahoga county, Ohio, wherein service was had against the defendant, George Backenstoe, by publication, an affidavit for publication now in the files having been executed by her attorney as notary; and thereafter the cause was heard by Judge Addams of said Insolvency Court and a judgment and decree entered by him, finding service by publication upon the defendant, jurisdiction of the parties and subject matter, and that the plaintiff should be and was thereby divorced from the defendant, George Backenstoe, and restored to her maiden name of Grace Daugherty.

11. That thereafter no direct attack was made upon said decree, and no indirect attack, except in the evidence, but not by the pleadings, of this case after it was brought into this court; and said divorce is therefore valid and binding and the said Grace Daugherty was a single woman thereafter, until married to Maurice P. Murnan.

12. That the **laws of Arizona** in force and effect in 1915 were as follows:

> "Section 3830. All regularly licensed or ordained clergymen, judges of courts of record and all justices of the peace of the several counties are authorized to solemnize the rites of matrimony between all persons legally authorized to marry."
>
> "Section 3833. No persons shall be joined in marriage within this state until a license shall have been obtained for that purpose from the clerk of the Supreme Court of the county in which one of the parties reside, or in which the marriage is to take place."
>
> "Section 3834. Any person desirous of marrying shall apply to the clerk of the Superior Court and shall receive from him a license directed to the persons authorized by law to solemnize the rites of matrimony

which shall be sufficient authority for any one of such persons to solemnize such marriage."

"Section 3836. The clerk of the Superior Court shall record all licenses issued by him as provided in this chapter in a well bound book kept for that purpose, and it shall also be the duty of the persons solemnizing the rites of matrimony to endorse the same on the license and make return of the same to the office of the clerk of the Superior Court within twenty days after the solemnization as aforesaid, which return shall also be recorded in a well bound book kept by the clerk of the Superior Court for that purpose."

"Section 3842. Every marriage ceremony must be performed in the presence of the officiating clergyman, judge or justice of the peace and at least two witnesses of lawful age, and a certificate evidence of such marriage must be signed by at least two such witnesses."

"Section 3844. The common law rule that a marriage may be contracted by agreement of the parties without marriage ceremony is hereby abrogated and no marriage contracted within this state shall be valid **unless a license be issued as provided in this chapter, and a marriage solemnized by one of the persons authorized by law or by some one purporting to act in the capacity of a clergyman, judge or justice and believed in good faith, by at least one of the parties, to be such.**"

"Section 1762. When the fact of marriage is required or offered to be proved before any court, evidence of the admission of such fact by the parties against whom the proceeding is instituted, or of general repute, or of cohabitation as married persons, or any other circumstantial or presumptive evidence from which the fact may be inferred, shall be competent."

Said Section 1762 of the Revised Statutes of 1913 appears in substantially the same form in Section 23-316 of the Arizona Code of 1939, which was compiled with annotations under the supervision of the members of the Supreme Court of Arizona, as follows:

"Section 23-316. Marriage Certificate—Oral Proo of Marriage. * * * When the marriage is to be proved evidence of the admission of such fact by the adverse party or of general repute, or of cohabitation as mar ried persons, or any other evidence from which the fac may be inferred, shall be competent."

Notes to Decision.

"Common Law Rule. Statute is simply declaratory of the rule of evidence at common law. In re Terry's Estate, 58 Minn., 268, 59 N. W., 1013.

"Marriage. In prosecution for bigamy, evidence is admissible to prove the first marriage by witnesses that the marriage was performed in a foreign country by one, apparently an officer, and that the parties lived together in various places as husband and wife. Ford v. State, 21 Ariz., 567, 192 Pac., 1117."

13. That on or about July 15, 1915, a marriage license was duly issued to said Maurice P. Murnan and Grace Daugherty (Backenstoe) by the clerk of the Superior Court of Coconino county at Flagstaff, and the marriage contract was entered into by said parties and the marriage solemnized by the justice of the peace in and for said county at Flagstaff, Arizona.

14. That there is now no record of said marriage in the office of the clerk of the Superior Court of said Coconino county, but the absence of said record may be accounted for by the failure of the justice or the parties to return the license with the certificate of the solemnization of the marriage to the said clerk of courts, or the failure of the clerk to make a record thereof, upon the return of said license.

15. That the fact of said ceremonial marriage is corroborated from the date thereof by repeated statements and admissions of the said Maurice P. Murnan, as well as of said Grace D. Murnan, as to said marriage in Arizona to close friends and associates, by their conduct and constant

association together, and by the reputation of the marriage among their friends and associates following July, 1915; and after August, 1919, when they purchased and went to live at Graceland, the large show place on North High street, by their general reputation as man and wife, their constant declarations of their marriage, their deeds and conveyances as man and wife, their recognition of mutual interest in each other's property and by all their conduct until the death of Maurice P. Murnan on May 12, 1937.

16. That the expressed desire of said parties to avoid any public declaration of their marriage and the giving of deeds in their single names from July, 1915, until her house of ill fame was closed in August, 1917, and while they lived at said house until August, 1919, was for the well authenticated reason that the association of her house in the public mind with his name would affect the taxicab business in which he was engaged.

17. That said Grace D. Murnan remained the wife of said Maurice P. Murnan until his death intestate on May 12, 1937, and as his surviving spouse was his sole heir to the seventeen parcels of the land described in the petition herein, of which she had possession until her death on November 16, 1939.

18. That the plaintiff and the other distant blood relations of said Maurice P. Murnan, as set forth in plaintiff's petition, are not the heirs of said Maurice P. Murnan and have no interest in the said seventeen parcels of real estate described in said petition, and are not entitled to the decree of partition as prayed for in said petition.

Geiger, P. J., and Barnes, J., concur.

New trial should be granted and findings of fact made to conform to dissent.

Hornbeck, J.

APPENDIX III.

Decision on Motion to Vacate Judgment—Court of Appeals.

(Rendered on the Twenty-seventh Day of July, 1942.)
(46 N. E. (2d), 667.)

Hornbeck, J.:

Submitted on (1) motion, dated June 24, 1942, of plaintiff-appellee and defendants-appellees, Mary Boland, Katherine Gruber, Anna Ford, Julia Caley, James Welsh, William Welsh, Mathew Welsh, Nora M. Page, Timothy Murnan, Mary Meyer, Grace Visser, Howard W. Meyer, John J. Meyer, Maria Miller, Nellie Pagnard, Virginia Rea and Ruth Hirt, to certify the record to the Supreme Court of Ohio for the reason that the judgment herein is in conflict with the judgment pronounced upon the same question by the Court of Appeals of the Seventh District of Ohio in Lichtenberger v. Milligan, 63 O. App., 107; and

(2) Upon a supplemental motion of date June 30, 1942, asking that if motion No. (1) be overruled, in the alternative the court set aside and vacate its former judgments dated June 6, 1942, and April 4, 1941, to dismiss this appeal upon law and fact, for the reason that it is apparent upon the record that this case is consolidated and that this action under the pleadings is primarily an action to recover specific real property and is, therefore, not appealable on law and fact and that the court is and was without jurisdiction to hear this case de novo in chancery, and the judgments entered by the court are repugnant to the provisions of the Fourteenth Amendment of the United States Constitution.

The motion to certify must be considered in the light of the amendment to the Constitution of Ohio of 1912, Article

IV, Paragraph 6, the pertinent part of which is as follows:

> "Whenever the judges of a Court of Appeals find that a judgment upon which they have agreed is in conflict with the judgment pronounced upon the same question by any other Court of Appeals of the state, the judges shall certify the record of the case to the Supreme Court for review and final determination."

The test, then, is whether or not our judgment is in conflict with the judgment in the cited case upon the same question. House v. Stark Iron & Metal Co., 33 Abs., 355. The one and only instance prior to finding and judgment wherein we were required to consider the type of appeal under which this cause would proceed in this court was upon the motion to appellees for an order dismissing the appeal on law and fact, for the following specific reason: (1) That it is apparent upon the face of the record that the appeal was not perfected as required by Section 12223-6, General Code, in that the judgment was rendered in favor of the plaintiff upon an accounting in equity in the sum of $18,056.02; that the bond, by the order of the court, at the request of the appellants, was for $1,000.00, plainly contrary to the mandatory provision of said section. The second ground was directed to the failure of the appellants to file a bill of exceptions and could not in any manner effect the appeal on questions of law and fact.

This motion was considered upon the specific ground assigned, determined adversely to the movers and overruled. It is obvious that the court did not have presented to it, consider or adjudicate the questions now presented by the first motion herein. The question now urged and decided in the cited case, Lichtenberger v. Milligan, supra, and in other authorities cited by appellees, is brought to our attention for the first time on the motion to certify. The situation thus presented does not in our judgment permit

or require a certification of conflict. The first motion will, therefore, be overruled.

(Motion to Vacate Judgment.)

The second and alternative motion seeks an order vacating our final judgment and the order overruling the motion of appellees to dismiss the appeal on questions of law and fact because this court had no jurisdiction to entertain the appeal as upon questions of law and fact. The question has been voluminously briefed.

The question now raised on this motion was not at any prior time brought to the attention of the court. The suit of the appellees is in partition. They invoked such action in the Common Pleas Court and likewise in this court and, subject only to the objection set forth in the motion to dismiss the appeal on questions of law and fact, interposed no objection whatever to the jurisdiction of this court.

We consider the question upon the assumption, although not the concession, that the judgment was not appealable on questions of law and fact.

Jurisdiction is the power of a court to hear and determine the cause generally. This court by the Ohio Constitution is given capacity to entertain appeals on questions of law and fact, general jurisdiction to determine the subject matter of such appeals and to pass upon and determine its own jurisdiction. The test of jurisdiction is the court's power to act at all, not the correctness of its decision in so acting.

We recognize that jurisdiction of a court of the subject matter may be raised at any time, even after judgment but the test of jurisdiction of the subject matter is not so limited as contended for by appellee. Improvement Co. v.

Malone, 78 O. S., 238. **The question presented is no longer an open one in Ohio but has been decided adversely to the claim of appellees both before and since the Constitution of 1912.** 2 O. Jur., 562-4; Drake v. Tucker, 83 O. S., 97; Cadwell v. Cadwell, 93 O. S., 23; The Trumbull Savings & Loan Co. v. Saviers, et al., 115 O. S., 403; Union Trust Co. v. Lessovitz, 122 O. S., 406; Habecker v. Houck, 16 Abs., 58.

The second motion, of date June 30, 1942, will be overruled.

Barnes, J., concurs. Geiger, P. J., concurs in overruling of second motion; dissents from the overruling of the first motion.